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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, ET AL.,
Petitioners,

VS.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. PETITIONERS' CONSTRUCTION FLOWS NATURALLY FROM THE STATUTORY LANGUAGE	1
II. FEDERAL EXPRESS'S "INTEGRATION" ARGUMENT FINDS NO SUPPORT IN THE STATUTE OR THE FACTS OF THE CASE AND PROVIDES NO WORKABLE STAN- DARD FOR THE RESOLUTION OF OTHER CASES	2
III. THE OVERBREADTH AND NATIONWIDE IMPLICATIONS OF THE MAJORITY'S RA- TIONALE WARRANT THE COURT'S PLE- NARY REVIEW	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Morales, et al. v. Trans World Airlines, Inc., cert. pending</i> Nos. 90-1604, <i>et al.</i>	7
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) . . .	2
<i>West v. Northwest Airlines, Inc., cert. pending</i> No. 91-505, <i>cross-pet. for cert. pending</i> No. 91-734	8

Statutes

49 U.S.C. App. § 1302(a)	5
49 U.S.C. App. § 1302(b)	4, 5
49 U.S.C. App. § 1302(b)(1)	5
49 U.S.C. App. § 1302(b)(2)	5
49 U.S.C. App. § 1302(b)(3)	5
49 U.S.C. App. § 1305(a)(1)	1, 6, 7
49 U.S.C. § 10528	4

Legislative History

H. Conf. Rep. No. 95-373, 95th Cong., 1st Sess. 14, <i>reprinted in</i> 1977 U.S. Code Cong. & Admin. News 3396, 3399	4
H. Rep. No. 96-1069, 96th Cong., 2nd Sess. 34, <i>reprinted</i> <i>in</i> 1980 U.S. Code Cong. & Admin. News 2283, 2316 . . .	4

Other Authorities

Am. Mgt. Ass'n Briefing, <i>Blueprints for Service Quality: The Federal Express Approach</i> (Am. Mgt. Ass'n N.Y. 1991)	4
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ARGUMENT

I

**PETITIONERS' CONSTRUCTION FLOWS NATURALLY
FROM THE STATUTORY LANGUAGE**

Federal Express argues that the preemption language of the Airline Deregulation Act ("ADA"), 49 U.S.C. App. § 1305(a)(1), bars state regulation of *all* its operations, "not just . . . its aircraft operations." Br. in Opp. 7. It contends that "[t]he ADA simply does not contain the limiting words that petitioner seeks to insert." *Id.* To the contrary, however, the plain words "relating to rates, routes, or services of any air carrier" bear the obvious and natural implication that Congress was referring to an airline's "rates, routes, or services" as an air carrier, *i.e.*, its "rates,

routes, or services" in the provision of air transportation. The limitless construction urged by Federal Express flies in the face of both "the context of other laws into which the statute fits," A-4,¹ and the fundamental presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Indeed, the primary contention in Federal Express's brief — that the company's purely intrastate, truck-only operations are an "integral" and indivisible part of its air transportation operations — implicitly accepts the very construction of the statute tendered by petitioners.

II

FEDERAL EXPRESS'S "INTEGRATION" ARGUMENT FINDS NO SUPPORT IN THE STATUTE OR THE FACTS OF THE CASE AND PROVIDES NO WORKABLE STANDARD FOR THE RESOLUTION OF OTHER CASES

Federal Express's "integration" argument is rife with problems. In the first place, like the majority opinion, it "never explains how the carriage of goods by land is somehow transformed into the carriage of goods by air." A-9 (footnote omitted). In this respect, its argument is largely beside the point, because it focuses on precisely those intermodal air *and* ground operations which California does not propose to regulate.² When the focus is redirected toward those intrastate, truck-only operations over which California asserts regulatory authority — the operations that are at issue in this case — the claim of "integration" dissolves. As found by the District Court, Federal Express's ground operations may be "commercially linked to its air transportation system, [but] its

¹As herein used, page references in which numerals are preceded by letters refer to pagination in the appendix to the petition for certiorari.

²California has repeatedly conceded that when air and ground operations are *truly* integrated, *i.e.*, when the air carrier transports the packages both by airplane *and* by truck, the state is preempted.

hauling operations are not substantially different from services provided by other [non-air] motor carriers." B-6.

The validity of petitioners' distinction is underscored by Federal Express's shallow analysis of the anticompetitive impacts of the Ninth Circuit's decision. Br. in Opp. 13-14. Federal Express fails to grasp that while its air and air/ground operations may compete with the operations of other air carriers, its intrastate, truck-only operations compete with the operations of intrastate motor carriers regulated by the state. Federal Express's unstated assumption is either the pretense that such intrastate motor carriers don't exist or the notion that Congress, in deregulating airlines, intended to put those intrastate motor carriers out of business. See Br. of California Trucking Ass'n as Amicus Curiae in Support of Petitioners filed herein Nov. 22, 1991. Indeed, even to the extent that there may exist other certificated air carriers who also have intrastate trucking operations, Federal Express's "integration" argument seeks to place the burden on each to demonstrate in lengthy court proceedings that its operations are sufficiently "integrated" to qualify for immunity from state regulation. Thus while Federal Express's "integration" argument, if accepted, would certainly benefit Federal Express, it is difficult to see how it would benefit fair competition.

Nor is Federal Express's "integration" argument supported by the record. Among the "'undisputed' facts," Br. in Opp. 5, *quoting* A-2-3, on which this case rests is the fact that the packages which the state seeks to regulate are segregated by Federal Express sorters for regularly-scheduled ground-only transportation within the state pursuant to a conscious company policy. F-2-6.³ Thus the District Court correctly found that Federal Express has presented not a shred of evidence that it is

³For example, the five Federal Express trucks that travel between Los Angeles and the San Francisco Bay Area do so on a daily basis at scheduled departure times — not, as Federal Express implies, only when the weather is bad or a plane has mechanical problems. F-2.

"an 'integrated air-ground system' whose operations should be considered under the single rubric of air carrier." B-9.⁴

Moreover, Federal Express has presented no evidence that the "preemption rule urged by petitioner would plainly undermine the efficiency and effectiveness of [Federal Express's] national air cargo system." Br. in Opp. 8. California has conceded not only that Federal Express will be accorded variances from regulatory requirements which it shows to be unduly burdensome but also that the state is willing to base its regulation on "estimates of the number of packages shipped by Federal Express solely by ground transportation in California." C-4.⁵

Federal Express relies heavily on language in 49 U.S.C. App. § 1302(b), *see* D-3, which articulates the policy of promoting the development of "an expedited all cargo *air* service system" (emphasis added) and "an integrated transportation system," but the legislative history of that section, not discussed by Federal Express, suggests that the service/system referred to involves "the transportation of property . . . by all-cargo aircraft or combination [cargo and passenger] aircraft," not transportation solely by truck. *See* H. Conf. Rep. No. 95-373, 95th Cong., 1st Sess. 14, *reprinted in* 1977 U.S. Code Cong. & Admin. News 3396, 3399.

⁴Federal Express also rests its "integration" argument on the majority's assertion that "[e]very [Federal Express] truck carries packages that are in interstate commerce by air." Br. in Opp. 5, *quoting* A-5. However, 49 U.S.C. § 10528 makes clear that Congress did not intend that the commingling of jurisdictionally-diverse packages on a single truck would alter the jurisdictional nature of the individual packages shipped. The contrary rule urged by Federal Express would undercut the clearly-articulated federal policy of maximizing the usage of motor carrier equipment to increase economic efficiency. *See* H. Rep. No. 96-1069, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2283, 2316.

⁵This latter concession hardly seems necessary, for Federal Express has recently made public its state-of-the-art package tracking ability which would presumably enable it to identify with precision and with little effort those packages which move purely intrastate and exclusively by truck. *See* Am. Mgt. Ass'n Briefing, *Blueprints for Service Quality: The Federal Express Approach* (Am. Mgt. Ass'n N.Y. 1991), at 59.

Moreover, Federal Express's analysis assumes that § 1302(b) was enacted as private legislation for the company's sole benefit. However, on the face of the statute it is clear that Congress was referring to the development of a single nationwide all-cargo air transportation system combining the services of many different air transportation providers, not a single private company. *See* §§ 1302(b)(1) (referring to "the encouragement and development of *an* expedited all-cargo air service system") (emphasis added) and 1302(b)(2) (referring to "the encouragement and development of *an* integrated transportation system") (emphasis added).⁶

Perhaps most importantly, the "integration" standard urged by Federal Express is inappropriate because it rests on a slippery slope. One can envision airlines contending that their frequent flyer credit card operations are "integral" to their air transportation services. From there, it is but a small leap to argue that other non-air-transportation activities are "integral" as well. The potential for pretextual claims of "integration" and burdensome case-by-case litigation to give content to the standard is limited only by the imagination of the air carrier involved.

III

THE OVERBREADTH AND NATIONWIDE IMPLICATIONS OF THE MAJORITY'S RATIONALE WARRANT THE COURT'S PLENARY REVIEW

Federal Express characterizes the issue presented as a narrow one. *Br. in Opp.* 9-14. At bottom line, however, the Ninth Circuit

⁶*See also* § 1302(b)(3), requiring the Civil Aeronautics Board to consider in its certificate decisions "[t]he provision of services without unjust discrimination, undue preferences or advantages, unfair or deceptive practices, or predatory pricing" — a difficult assignment when the CAB does not regulate the provision of the intrastate motor carrier services with which Federal Express is attempting to compete. *See also* § 1302(a), which refers repeatedly to the ADA's policies of facilitating competition in "*air* transportation" (emphasis added) and "*air* transportation services" (emphasis added) and of prohibiting anticompetitive practices.

majority has articulated an unduly expansive reading of § 1305(a)(1). By focusing on an airline's status as an "air carrier" rather than on the nature of the activities sought to be regulated by the state, the majority's opinion can be read as immunizing from state regulation virtually all non-air-transportation business activities of air carriers. This is so because the majority opinion appears to equate the statutory words "regulation . . . relating to rates, routes, or services of any air carrier" with any regulation which "bear[s] on price" or "affect[s] the price" or "determine[s] cost." A-6.⁷ Such a broad reading of the statute creates a potentially insurmountable hurdle to state regulation of any of the business activities of air carriers.⁸

California's concern about the overbreadth of the majority's holding is neither a "mischaracterization" (Br. in Opp. 9) nor alarmist. The construction feared by California is recognized as a possible reading of the majority opinion by the dissent (see A-9-10, text and nn. 4, 6), by the Solicitor General of the United States (see Br. for the United States as Amicus Curiae, *Morales*,

⁷Notably, no discussion of this portion of the Ninth Circuit's rationale—the majority's precise definition of "terms of service" and hence "economic regulation"—appears in Federal Express's brief.

⁸Perhaps nowhere is the shallowness of Federal Express's analysis as apparent as in its discussion of public safety. Br. in Opp. 14. The company asserts that the majority opinion draws a clear line between state regulation "of the safety features of Federal Express's trucks and the safety standards applicable to its drivers" (which is permissible) and state regulation of its "rates and terms of service" (which is preempted). *Id.* However, it ignores the fundamental inconsistency in its analysis; since under the majority opinion the phrase "terms of service" includes anything which "bear[s] on price" or "affect[s] the price" or "determine[s] cost," A-6, the argument is available that safety regulation (which bears on cost), as well as the regulation of any non-air-transportation activities the company chooses to enter into, is preempted. Notably, Federal Express nowhere explicitly embraces California's argument that the company is subject to licensing, insurance and fee requirements related to safety as well as possibility of license revocation for violation. Without these tools, a state's efforts to assure trucking safety on its highways would be thwarted.

et al. v. Trans World Airlines, Inc., cert. pending Nos. 90-1604, *et al.*, filed Oct. 24, 1991, at 13-14), by the Attorneys General of forty-six of the fifty States of the Union (*see* Br. Amicus Curiae of Forty-Six States in Suppt. of Petitioners filed herein Nov. 22, 1991, at 4, 6-7, 10-11), by the National Association of Regulatory Utility Commissioners (*see* Br. of the NARUC as Amicus Curiae in Suppt. of Petitioners filed herein Nov. 22, 1991), and by the nation's largest motor carrier employee union (*see* Br. Amicus Curiae of the Int'l Brotherhood of Teamsters in Suppt. of Petitioners filed herein Nov. 22, 1991).

The entry of airlines into non-air-transportation business activities as a result of the special immunity from state regulation conferred by the majority opinion is by no means farfetched. Airlines presently can, and in many instances do, offer credit card services in connection with their frequent flyer programs, as well as flight, baggage and travel insurance services, car rental services, hotel, restaurant and alcoholic beverage services and travel/tour package and booking services, among others. It is no great leap to assume that if such companies are immunized from state regulation in areas traditionally regulated by the states solely because of their air carrier status, they would have a strong incentive to broaden significantly their non-air-transportation business activities to exploit the unfair competitive advantage conferred upon them by the majority. The use of an air carrier certificate as a shield from legitimate state regulation or as an invitation to engage in anticompetitive conduct is hardly what Congress intended when it enacted § 1305(a)(1).

The extreme overbreadth of the majority's rationale makes this case an appropriate vehicle for initial review of the preemptive reach of § 1305(a)(1). By first clarifying whether Congress intended to immunize from state regulation the activities of air carriers having little or no relationship to the provision of air transportation, the Court would be establishing an analytical framework from which to address narrower questions, such as whether Congress intended to allow air carriers to violate state consumer fraud laws with impunity, *see Morales, supra*, or whether Congress intended to immunize the conduct of air carriers toward their passengers from state compensatory or

punitive damages remedies, *see West v. Northwest Airlines, Inc.*,
cert. pending No. 91-505, *cross-pet. for cert. pending* No. 91-734.

CONCLUSION

The Court should grant certiorari and set the cause for briefing
and oral argument.

Respectfully submitted,

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